

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNIVERSAL TRADING & INVESTMENT
CO,

Plaintiff,

v.

KIRITCHENKO ET AL,

Defendant.

No. C-99-03073 MMC (EDL)

**ORDER DENYING REQUEST FOR
PARTIAL RECONSIDERATION**

During a hearing on May 10, 2007 on an unrelated motion, counsel for Defendant Lazarenko made a verbal request that the Court reconsider and strike ¶ 3 of its May 2, 2007 Order Re Motion for Protective Order and Motion to Compel. Paragraph 3 ordered Defendant Lazarenko to execute a FOIA release to obtain reports of interviews between Defendant and the government, which would then be produced to Plaintiff. See May 2, 2007 Order, ¶ 3. On May 11, 2007, Defendant's counsel filed a declaration supporting its request, explaining that counsel had been unaware that the only interviews between Defendant and the government were done under the protection of a proffer agreement, which preserved Defendant's Fifth Amendment privilege against self-incrimination as to his statements to the government. See Weinberg Decl. (Doc. No. 1346). Defendant argues that it cannot comply with Paragraph 3 without waiving his Fifth Amendment privilege, which Defendant declines to do. Id. The Court ordered Defendant to brief the issue, and allowed Plaintiff to file a response. The Court has reviewed the papers and the applicable law and finds this matter appropriate for a decision without oral argument. Accordingly, for the reasons stated below, the Court hereby DENIES Defendant's request for reconsideration, and ORDERS Defendant to immediately comply with Paragraph 3 of the Court's May 2, 2007 Order.

1 The Fifth Amendment privilege against compulsory self-incrimination protects against any
 2 disclosures which a witness reasonably believes could be used in a criminal prosecution or could
 3 lead to other evidence which might be so used. See Kastigar v. United States, 406 U.S. 441, 444-45
 4 (1972) (emphasis added). The privilege “does not extend to consequences of a noncriminal nature,
 5 such as threats of liability in civil suits, disgrace in the community, or the loss of employment.”
 6 United States v. Apfelbaum, 445 U.S. 115, 124-25 (1980). Defendant entered into proffer
 7 agreements with the government under a grant of “use immunity” rather than broader immunity, that
 8 is, the government agreed that if Defendant would tell the government what he knew about certain
 9 criminal activity, the government would “not use any statements made by [Defendant] during the
 10 proffer directly against [Defendant] Lazarenko and his case-in-chief in any criminal case... .” See
 11 Weinberg Decl. (quoting proffer agreement), at 3:4-6. Thus, the Defendant made no statements to
 12 the government other than those covered by these proffer agreements.

13 Although these agreements do not provide full immunity because they “permit[] derivative
 14 use of [Defendant’s] statements,” see Opp. at 5:3-5, the statements themselves are immunized and
 15 the government already has them. Paragraph 3 does not require Defendant to testify further about
 16 these statements, nor does it require Defendant to produce any information other than that which the
 17 government already has. Thus, Defendant is not exposed to any further incrimination beyond what
 18 he already faces. Further, authorizing the FOIA release of the statements does not appear to be a
 19 testimonial act. The Court sees no waiver beyond what Defendant already made to the government
 20 by making the proffers. Accordingly, Defendant can have no reasonable belief that complying with
 21 Paragraph 3 of the Court’s May 2, 2007 Order could incriminate him and Defendant’s assertion of
 22 the Fifth Amendment privilege is unfounded. See Rogers v. United States, 340 U.S. 367, 374 (1964)
 23 (Fifth Amendment privilege exists only where there is “a reasonable danger of further crimination in
 24 light of all the circumstances, including any previous disclosures.”).

25 **IT IS SO ORDERED.**

26 Dated: June 8, 2007

Elizabeth D. Laporte
 ELIZABETH D. LAPORTE
 United States Magistrate Judge